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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Petitioner,

v.

CHAULK SERVICES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. Whether a federal court required to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), may nevertheless exercise jurisdiction if it finds that a plaintiff has made a facially conclusive claim of pre-emption, a question left open in *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989).

2. Whether the National Labor Relations Act, 29 U.S.C. § 158, pre-empts state anti-discrimination laws where an employee claims an unfair labor practice and gender discrimination against an employer.

List of Parties

The parties to the proceeding below were appellee-petitioner Massachusetts Commission Against Discrimination, defendants-appellees Petrina Doulamis Sullivan and International Association of Emergency Medical Technicians (EMTs) & Paramedics, National Association of Government Employees (NAGE), American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), and appellant-respondent Chaulk Services, Inc.

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v.

CHAULK SERVICES, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Pursuant to United States Supreme Court Rules 10 and 12, petitioner Massachusetts Commission Against Discrimination (MCAD or Commission) respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on November 27, 1995. Pet. App. 5A-74A. The Commission's petition for rehearing and suggestion for

rehearing *en banc* was denied on January 18, 1996. Pet. App. 75A-76A.

Opinion Below

The judgment of the United States District Court for the District of Massachusetts is not reported and is reprinted in the Appendix hereto, Pet. App. 1A-4A. The opinion of the United States Court of Appeals for the First Circuit is reported at 70 F.3d 1361 (1st Cir. 1995). It is reprinted in the Appendix hereto, Pet. App. 5A-74A.

Jurisdiction

The United States Court of Appeals for the First Circuit issued its opinion and judgment on November 27, 1995. Pet. App. 6A. The Commission's petition for rehearing and suggestion for rehearing *en banc* was denied on January 18, 1996. Pet. App. 75A-76A. The Commission invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a)(1994).

Statutes and Constitutional Provisions Involved

The National Labor Relations Act (NLRA), 29 U.S.C. § 158 (1994), is set forth in the Appendix hereto at Pet. App. 77A-97A. Massachusetts General Laws (Mass. G.L.) chapter 151B, sections 3, 4, and 5 (1994 ed.), are set forth in the Appendix hereto at Pet. App. 98A-158A. 29 C.F.R. § 1601.12 (1995) is set forth in the Appendix hereto at Pet. App. 159A-168A.

Statement of the Case

In this case, an employee claims that her employer discriminated against her based on her union activities and gender. Both claims involved the same parties and the same nucleus of facts. Petrina Doulamis (Doulamis) had filed a complaint with the Commission alleging gender discrimination by respondent Chaulk Services, Inc. (Chaulk). *See* Mass. G.L. c. 151B, § 5; Pet. App. 11A, 145A-158A. Additional labor-related charges were subsequently filed by International Association of EMTs and Paramedics, NAGE, AFL-CIO

(Union), on behalf of Doulamis, with the National Labor Relations Board (NLRB), against Chaulk. Pet. App. 8A-12A.

On December 8, 1994, Chaulk filed a complaint in the United States District Court for the District of Massachusetts seeking to enjoin the Commission from investigating Doulamis's complaint of gender discrimination. Pet. App. 11A, 12A. In its verified complaint, Chaulk claimed that the Commission's assertion of state authority over Doulamis's charge of gender discrimination directly threatens and significantly interferes with the jurisdiction of the NLRB. Pet. App. 12A. Chaulk further maintained that Massachusetts anti-discrimination laws are pre-empted by the NLRA. Pet. App. 13A.

The Commission filed a motion to dismiss arguing that the District Court should abstain under *Younger*. Pet. App. 11A. The District Court denied Chaulk's request for injunctive relief and allowed the Commission's motion to dismiss. Pet. App. 1A-4A. The District Court ruled that it would "abstain from deciding [Chaulk's] pre-emption claim (raised by way of

application for preliminary injunction) in light of the pending state agency proceedings." The District Court cited *Younger v. Harris*, 401 U.S. 37 (1971); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); and *Brotherhood of Locomotive Eng'rs. v. Massachusetts Comm'n Against Discrimination*, 695 F. Supp. 1321 (D. Mass. 1988), in support of its decision to abstain. Pet. App. 4A.

Chaulk appealed the decision of the District Court to the United States Court of Appeals for the First Circuit. On November 27, 1995, the majority of the panel (Torrella and Casellas, JJ.[1]) of the First Circuit reversed the decision of the District Court and remanded the case "so that Chaulk may address any pleading deficiencies that currently preclude the continued prosecution of its petition for relief." Pet. App. 38A. In holding that Massachusetts anti-discrimination laws are "expressly" preempted by the NLRA, the majority of the panel noted the issue of pre-emption under the NLRA, *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and

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[1] Of the District of Puerto Rico, sitting by designation.

the possibility that a "facially conclusive" claim of pre-emption might render *Younger* abstention inappropriate, a question left open in *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989)(*NOPSI*). Pet. App. 23A. The majority found that since Doulamis's claims are preempted by the NLRA, the Commission does not have jurisdiction of her gender discrimination claims. Pet. App. 25A. In addition, the majority held that although the case satisfies the criteria for *Younger* abstention, abstention was nevertheless inappropriate because Chaulk's claim of pre-emption is "facially conclusive" or "readily apparent," and "no significant state interests are served when it is clear that the state tribunal is acting beyond the lawful limits of its authority." Pet. App. 33A, 36A.

The dissent (Lynch, J.) opined that the NLRA does not preempt Massachusetts anti-discrimination laws and thus, *Younger* abstention is required. Pet. App. 38A-74A. Specifically, the dissent stated that Chaulk's complaint did not present a facially conclusive claim of pre-emption "because

Congress has affirmatively stated in the language and through the structure of Title VII [the Civil Rights Act of 1964] itself that state anti-discrimination laws may provide a remedy that overlaps with the NLRA." Pet. App. 53A. In the absence of a facially conclusive claim of preemption, the dissent stated that the present case satisfies the criteria for *Younger* abstention and must be dismissed.

Reasons for Granting the Writ

The Court should grant the petition to resolve the question left open in *NOPSI*: Whether a facially conclusive claim of federal pre-emption trumps the requirement of *Younger* abstention. The Court should also grant the petition to resolve the split between the First Circuit and the Supreme Judicial Court of Massachusetts in *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 Mass. 160, 375 N.E.2d 1192 (1978), by deciding the issue whether the NLRA pre-empts state anti-discrimination laws where an employee claims an unfair labor practice and gender discrimination against an employer.

I. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION, LEFT OPEN IN *NOPSI*, CONCERNING WHETHER A FACIALLY CONCLUSIVE PRE-EMPTION CLAIM OVERRIDES *YOUNGER* ABSTENTION.

This case presents a question of national importance regarding whether a federal court, when required to abstain under *Younger*, may nevertheless exercise jurisdiction when it determines that a party has made a "facially conclusive" claim of pre-emption. The Court should grant the petition to answer this significant question left open in *NOPSI*.

A. *Younger* Abstention is Required Where a Party Seeks to Enjoin an Ongoing State Administrative Proceeding that is Judicial in Nature and Implicates an Important State Interest.

The Court should grant the petition to answer the question left open in *NOPSI* and enforce the principles of comity and federalism articulated in *Younger*. *Younger* held that the federal courts may not enjoin ongoing state criminal proceedings because comity requires "a proper respect for state

functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44. The concept of comity represents

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to so in ways that will not unduly interfere with the legitimate activities of the States.

Id. Indeed, because of the principles of comity and federalism, "the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is *not* issue such injunctions." *Id.* at 45 (emphasis added).

After *Younger*, this Court has expressly applied its principles of comity and federalism to other pending state proceedings, including state civil and administrative proceedings. *See Middlesex Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)(Court abstained from

interfering in pending civil judicial proceedings); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. at 627-28 (*Younger* applied to state administrative proceedings concerning claims of gender discrimination). This Court rested these holdings on "the 'more vital consideration' of the proper respect for the fundamental role of States in our federal system." *Id.* at 626 (quoting *Younger*, 401 U.S. at 44).[2]

This Court has also made it clear that "[w]here a case is properly [within the *Younger*] category of cases, there is no discretion to grant injunctive relief." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 816 n.22 (1976); *see Sun Refining & Marketing Co. v. Brennan*, 921 F.2d 635, 639 (6th Cir. 1990)("[U]nlike other forms of

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[2] Based on *Younger* and its progeny, the First Circuit has required abstention where the civil or administrative proceedings satisfy three conditions:

> (1) the proceedings are judicial (as opposed to legislative) in nature; (2) they implicate important state interest; and (3) they provide an adequate opportunity to raise federal constitutional challenges.

Bettencourt v. Massachusetts Bd. of Registration in Medicine, 904 F.2d 772, 777 (1st Cir. 1990).

abstention, when a case is properly within the *Younger* category of cases, there is no discretion on the part of the federal court to grant injunctive relief"); *Seneca-Cayuga Tribe of Okla. v. State ex rel. Thompson*, 874 F.2d 709, 711 (10th Cir. 1989)("*Younger* abstention is not discretionary once the conditions are met"). This is so even when the Court is faced with a claim of pre-emption. *NOPSI*, 491 U.S. at 364-65. More recently, in *NOPSI*, this Court held that even where a party raises a pre-emption claim and seeks to enjoin an ongoing state administrative proceeding that is judicial in nature, *Younger* abstention is nevertheless required:[3]

> [The appellant contends that] a district court presented with a pre-emption-based request for equitable relief should take a quick look at the merits; and if upon that look the claim appears substantial, the court should endeavor to resolve it. *We disagree*.

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[3] While this Court in *NOPSI* affirmed the principles of comity and federalism, and the application of *Younger* if the case met the criteria for abstention, it ultimately held that *Younger* did not apply because the proceedings at issue were not judicial in nature. *NOPSI*, 491 U.S. at 367-73.

Id. (emphasis added). In rejecting the appellant's argument in *NOPSI*, this Court again voiced its concern for comity and federalism:

> [t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than pre-emption based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action.

Id. at 365.

The present case clearly falls within the parameters of *Younger* and *Dayton Christian Schools*: The proceedings before the Commission were ongoing at the time Chaulk sought injunctive relief from the District Court, the proceedings that it sought to enjoin are judicial in nature, and protecting the public from unlawful gender discrimination has been unequivocally recognized by this Court as an important state interest. *See Dayton Christian Schools*, 477 U.S. at 628 ("the elimination of prohibited sex discrimination is a sufficiently important state interest"). The decision of the lower court, however, initially (and incorrectly) addressed the merits of

Chaulk's pre-emption claim, and only considered the appropriateness of *Younger* abstention as an afterthought. Pet. App. 15A, 29A. In doing so, the lower court disregarded *Younger* and its progeny, and violated principles of comity and federalism. As such, the Court should grant the petition to correct this error and uphold the longstanding principles of comity and federalism.

B. The "Facially Conclusive" Language in *NOPSI* Has Created Great Confusion and Inconsistencies Among the Courts.

Although *NOPSI* made it clear that "the mere assertion of a *substantial* constitutional challenge to state action will not alone compel the exercise of federal jurisdiction," this Court left open the possibility that a "facially conclusive" claim of pre-emption trumps *Younger*. *NOPSI*, 491 U.S. at 365 (emphasis added). In *NOPSI*, the appellant argued that "even if a *substantial* claim of federal pre-emption is not sufficient to render abstention inappropriate, at least a *facially conclusive* claim is." *Id.* at 367. (emphasis in original). In response to this

argument, this Court stated, "*[p]erhaps so* . . . [b]ut we do not have to decide the matter here, since the proceeding and order at issue do not meet that description." *Id.* (emphasis added). This Court in *NOPSI* further elaborated that in order for a pre-emption claim to be facially conclusive, a court must be able to "conclusively say [that the pre-emption claim is facially conclusive] *without further factual inquiry* - and what requires further factual inquiry can hardly be deemed 'flagrantly' unlawful for purposes of a threshold abstention determination." *Id.* (emphasis added).

This portion of *NOPSI* has caused confusion and inconsistency in the lower federal courts. *See Martin Marietta Corp. v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1404 (4th Cir. 1994)(finding *Younger* abstention proper and refusing to address whether a facially conclusive or readily apparent claim of pre-emption would bar abstention, because *NOPSI* did not resolve the issue); *Norfolk & Western Ry. Co. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991)("*NOPSI* suggests that a federal court could hear a case to

interpret the preemptive federal law without making any factual findings"); *H.P Hood, Inc. v. Comm'r of Agriculture*, 764 F. Supp. 662, 675 (D. Me. 1991)(*NOPSI* "did not clarify the practical difference between the two standards [of '"substantial" and "facially conclusive"' or '"flagrantly and patently violative"']"); *Fuller v. Bartlett*, 894 F. Supp. 874, 880 (D. Md. 1995)("neither the Supreme Court nor the Fourth Circuit has yet decided the issue").

Adding to the confusion and inconsistency resulting from the *NOPSI* decision, the Ninth and Eleventh Circuits have eased the strict "facially conclusive" standard by adopting NLRA pre-emption principles[4] and applying a "readily

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[4] In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-749 (1985) this Court articulated two distinct NLRA pre-emption principles: "*Garmon*" pre-emption and "*Machinists*" pre-emption. The *Garmon* pre-emption principle arose from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, which forbids state and local regulation of activities that constitute an unfair labor practice under § 158. The *Garmon* pre-emption doctrine also prohibits regulation of activities that the NLRA *arguably* protects or forbids: "This rule of pre-emption is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' 'integrated scheme of regulation.'" *Building & Trades Council v. Associated Builders*, 507 U.S. 218, 225 (1993) (quoting *Garmon*, 359 U.S. at 247). There are, however, two exceptions to this pre-emption doctrine: Activities which are "merely peripheral concern[s]" of the NLRA and conduct which "touch[es] interests so deeply rooted in

apparent" test[5] to determine whether a pre-emption claim overrides *Younger* abstention. *See Baggett v. Department of Professional Regulation, Bd. of Pilot Comm'rs*, 717 F.2d 521, 524 (11th Cir. 1983)("[w]hen pre-emption is readily apparent . . . and state tribunal is acting beyond the lawful limits of authority, abstention can serve no principle of comity"); *Bud Antle, Inc. v. Barbosa*, 35 F.3d 1355, 1365 (9th Cir. 1994), *modified*, 45 F.3d 1261 (9th Cir. 1994)(*Younger* abstention improper where "the state tribunal is acting beyond the lawful

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local feeling and responsibility" may continue to be regulated by state law and are not pre-empted by the NLRA. *Garmon*, 359 U.S. at 243-244.

The "*Machinists*" pre-emption doctrine prohibits state and municipal regulation of areas that have been left "to be controlled by the free play of economic forces." *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1959). "*Machinists* pre-emption . . . precludes state and municipal regulation 'concerning conduct that Congress intended to be unregulated.'" *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614 (1986) (quoting *Metropolitan Life*, 471 U.S. at 749). *Machinists* pre-emption maintains Congress' "intentional balance 'between the uncontrolled power of management and labor to further their respective interests.'" *Id.* at 416 (citations omitted).

[5] *NOPSI* specifically stated that a *substantial* claim of pre-emption will not evoke federal jurisdiction in face of *Younger* abstention. *NOPSI*, 491 U.S. at 364 (Court rejected notion that a district court should "take a quick look" at the merits of substantial claim of preemption).

limits of its authority" and pre-emption is "readily apparent"). *See also Sycun Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994)(*Younger* abstention inappropriate where pre-emption is readily apparent and state tribunal is acting beyond its authority); *Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991)(same).

The majority opinion below shows that the "facially conclusive" language in *NOPSI*, when considered with the "readily apparent" standard created by the Ninth and Eleventh Circuits, has created substantial confusion in the lower courts. In its decision, the Court of Appeals commingled the two standards and ultimately held that "it is 'readily apparent' that the Commission is acting beyond its jurisdictional authority by entertaining Doulamis's complaint, for it is readily apparent that Chaulk's conduct at issue is at least arguably prohibited by, and thus subject to the NLRA." Pet. App. 36A. In arriving at this conclusion, the lower court first considered whether it is "readily apparent" that the NLRA preempts state anti-discrimination laws. Pet. App. 13A, 25A. After holding

that it does, the lower court then addressed the threshold issue of *Younger* abstention, but recognized that "even the *NOPSI* decision leaves open the possibility that a 'facially conclusive' claim of pre-emption might render abstention inappropriate." Pet. App. 35A. The manner in which the majority of the lower court reached its decision, and the conflicting decisions rendered by other courts following *NOPSI*, demonstrate the compelling need for the Court to settle the issue. For these reasons, the Court should grant the petition to resolve and clarify the issue whether a "facially conclusive" or "readily apparent" claim of pre-emption trumps *Younger* abstention.

C. The Decision Below Undercuts the Principles of *Younger* and Its Progeny.

The possibility that a "facially conclusive" claim of pre-emption may trump the requirements of *Younger* abstention violates the principles of comity and federalism consistently recognized by this Court. *Younger* was based on the "vital consideration" of the proper respect for the fundamental role of States in our federal system and the legitimate activities of the

States. *Younger*, 401 U.S. at 44. These principles of comity and federalism require courts to withhold equitable relief in cases that fall under *Younger* and its progeny to avoid undue interference in pending state proceedings. *Id.* at 45; *NOPSI*, 491 U.S. at 359.

Allowing a "facially conclusive" pre-emption claim to trump *Younger* subverts the underlying principles of *Younger*. In *NOPSI*, 491 U.S. at 364-365, this Court rejected an argument that "a district court presented with a pre-emption based request for equitable relief should take a quick look at the merits; and if upon that the look the claim appears substantial, the court should endeavor to resolve it." The Court should likewise reject the concept that a facially conclusive claim of pre-emption trumps the requirement of *Younger* abstention. A federal court that fails to abstain under *Younger* where a party raises a facially conclusive pre-emption claim prevents state courts from exercising proper jurisdiction over matters of great local concern, such as enforcing state anti-discrimination laws. State courts are equally equipped to

address federal questions such as pre-emption raised by parties as a defense. *See Dayton Christian Schools*, 619 U.S. at 629 ("constitutional claims may be raised in state-court judicial review of the administrative proceedings"); *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 Mass. at 173-177, 375 N.E.2d at 1201-1203 (finding that the NLRA does not pre-empt Massachusetts anti-discrimination laws). Since a "facially conclusive" exception to *Younger* undermines the longstanding principles of comity and federalism, and state courts are competent to decide pre-emption claims, the Court should grant the petition to decide whether *Younger* abstention should be enforced regardless of any pre-emption claim.

II. THE NLRA DOES NOT PRE-EMPT STATE ANTI-DISCRIMINATION LAWS.

This case also presents a question of national significance concerning whether the NLRA pre-empts state anti-discrimination laws. The Court should grant the petition to resolve the conflict between the First Circuit and the

Massachusetts Supreme Judicial Court on this issue. The Court should also grant the petition to settle the important federal issue whether Congress intended that the NLRA pre-empt state anti-discrimination laws where an employee claims an unfair labor practices and gender discrimination against an employer.

A. The Majority Decision Below Conflicts with a Decision by the Supreme Judicial Court of Massachusetts.

The Court should grant the petition because the majority opinion below conflicts with a decision by the Massachusetts Supreme Judicial Court. While the majority opinion below held that it is "readily apparent" and "facially conclusive" that the NLRA pre-empts state anti-discrimination laws, the Massachusetts Supreme Judicial Court rejected a similar argument by an employer against the Commission that chapter 151B was pre-empted by the NLRA. In *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 Mass. at 173-177, 375 N.E.2d at 1201-1203, the Supreme Judicial Court held that the exclusion of pregnancy-related

disabilities from a comprehensive disability plan constituted gender discrimination in violation of the Massachusetts anti-discrimination laws. The employer, however, argued that the unlawful practices provision of the Massachusetts anti-discrimination laws, Mass. G.L. c. 151B, § 4, is preempted by the NLRA. *Id.* at 173, 375 N.E.2d at 1202. The Supreme Judicial Court rejected the employer's argument and ruled that "[d]iscrimination in employment opportunity is generally considered to be a 'peripheral concern' of the National Labor Relations Act, and thus *State anti-discrimination statutes are not preempted by Federal labor law.*" *Id.* at 174, 375 N.E.2d at 1202 (emphasis added).

The majority decision below directly conflicts with the holding in *Massachusetts Elec. Co.* A conflict between decisions of state and federal courts within the same jurisdiction raises the concern of forum shopping. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). The Court has, accordingly, granted petitions for certiorari to resolve such conflicts and thereby prevent forum shopping. *See e.g. Atkins*

v. Rivera, 477 U.S. 154, 156 (1986)(Court granted certiorari to resolve conflict between rulings by Massachusetts Supreme Judicial Court and two Federal Courts of Appeals); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 119 (1982)(Court entertained appeal where decision by Court of Appeals for the First Circuit conflicted with a decision of Massachusetts Supreme Judicial Court). The conflict created by the majority decision below should be resolved by this Court as well.

B. State Anti-Discrimination Laws Are Not Pre-empted by the NLRA.

The Court should also grant the petition because the court below incorrectly held that the NLRA pre-empts state anti-discrimination laws. The relevant state statute, Mass. G.L. c. 151B, § 3, prohibits discrimination based on "race, color, religious creed, national origin, sex, sexual orientation, ancestry, children, marital status, veteran status or membership in the armed services, the receiving of public assistance, or handicap of any person alleging to be a qualified handicapped person." Pet. App. 99A. *See* Mass. G.L. c. 151B, § 4, Pet.

App. 104A. The scope of prohibited discrimination under the NLRA, 29 U.S.C. § 158, however, pertains to very specific types of discrimination, viz., "in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any labor organization." Pet. App. 77A-78A. Section 158(b)(2) of the NLRA also pertains to discrimination against an employee "with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." Pet. App. 79A. Nothing in the NLRA contains a clear statement by Congress that it intended to pre-empt the states from prohibiting discrimination based on gender.

The clear statement required for pre-emption rests on fundamental "[p]rinciples of federalism." *Department of Revenue of Or. v. ACF Indus., Inc.*, 114 S. Ct. 843, 850 (1994). When considering pre-emption claims, this Court has shown great solicitude for state sovereignty. *See Seminole Tribe of*

Florida v. Florida, 116 S. Ct. 1114, 1996 WL 134309 at *4 (1996)("each State is a sovereign entity in our federal system"). Because of the importance of the federalist structure of joint sovereigns and the need for "a proper balance between the States and the Federal Government," this Court will not invalidate state law absent clear congressional intent. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

These principles of federalism also dictate that consideration of pre-emption claims made under the Supremacy Clause begin with the basic "presumption that Congress does *not* intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1676 (1995)(emphasis added); *see also Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"). This strong presumption against pre-emption "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the

courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)(citations omitted). Hence, state law is pre-empted only if there is "an unambiguous congressional mandate to that effect," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963), and "it is the 'clear and manifest purpose of Congress.'" *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)(quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). Furthermore, "[a]ny indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947)(Frankfurter, J., dissenting).

The NLRA does not contain any language--let alone a strong statement--pre-empting state anti-discrimination laws. Although the Court has yet to address this issue, it has ruled that the NLRA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17 (1994), provide concurrent

remedies. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974). The Court has held that "[t]he clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Id.* at 48. Thus, "the relationship between [the NLRB and Equal Employment Opportunity Commission] is complementary since consideration of the claim by both forums may promote the policies underlying each." *Id.* at 50-51.

Because it is clear that Congress did not intend that the NLRA pre-empt Title VII, it is equally unambiguous that Congress did not intend that the NLRA preempt state anti-discrimination laws. Congress intended that the States participate with the Federal government, specifically, the Equal Employment Opportunity Commission (EEOC), in prohibiting alleged discriminatory employment practices. *See* 42 U.S.C. § 2000e-5(c). Title VII expressly provides that claims of gender discrimination in the work place are solely within the Commission's jurisdiction pursuant to G.L. c. 151B, § 3, and

of the EEOC's under 42 U.S.C. § 2000e-5(c). *See* 29 C.F.R. § 1601.13(a)(3)(I)(1995)("In order to give full weight to the policy of section 6(c) of title VII, which affords State and local fair employment practice ["FEP"] agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII or the ADA and State or local law, the [EEOC] adopts the following procedures with respect to allegations of discrimination filed with the [EEOC] . . . [i]t is the intent of the [EEOC] to thereby encourage the maximum degree of effectiveness in the State and local agencies"). Pet. App. 160A.

The majority opinion incorrectly held that the NLRA pre-empts state anti-discrimination statutes. This holding presents a serious risk to both state and federal enforcement of civil rights laws. In essence, the majority opinion defeats the jurisdiction of both the Commission and the EEOC to hear and decide claims of discrimination. Thus, the majority opinion below is contrary to congressional intent and undermines the legitimate interests of both state and Federal governments to

enforce state anti-discrimination statutes and Title VII. Accordingly, the Court should grant the petition to answer this crucial federal question.

Conclusion

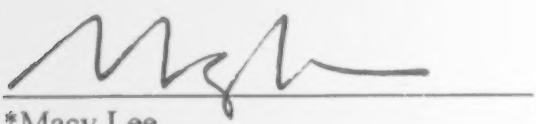
For the reasons stated above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,

By its attorneys,

SCOTT HARSHBARGER
ATTORNEY GENERAL



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